UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 64

Docket No. CH-844E-05-0545-I-2

Sharon Y. Jordan,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. CSA 8 240 927

March 1, 2007

Sharon Y. Jordan, Lyndon, Kentucky, pro se.

Charlretta T. McNeill, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Member Sapin issues a separate dissenting opinion.

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes

this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at

our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

/s/
Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF BARBARA J. SAPIN

in

Sharon Y. Jordan v. Office of Personnel Management

MSPB Docket No. CH-844E-05-0545-I-2

¶1 My colleagues agree with the Office of Personnel Management (OPM) and the administrative judge (AJ) that the appellant failed to meet her burden of establishing entitlement to a disability retirement annuity. For the reasons discussed below, I respectfully dissent from the majority and would GRANT the appellant's petition for review (PFR), REVERSE the initial decision (ID) and OPM's reconsideration decision, and ORDER OPM to award disability retirement benefits to the appellant.

BACKGROUND

¶2 The appellant was a part-time WG-1 Food Service Worker at the Louisville, Kentucky Veterans Administration Medical Center (agency). Initial Appeal File (IAF), Tab 3, subtabs IID, IIE. On May 23, 2003, she was in an automobile accident. *Id.*, subtab IID. She subsequently returned to work, but, on June 20, 2003, she aggravated an injury she received in the accident. *Id.*, subtab IID. She did not return to work thereafter. *Id.*, subtab IID (Supervisor's Statement). On March 4, 2004, she filed her disability retirement application. *Id.*, subtab IIE. On September 9, 2004, the agency proposed to remove her for failure to maintain a regular schedule, excessive absence, and unauthorized absence. IAF, Tab 1 at 16-17. The appellant resigned on September 20, 2004, however, before the agency acted on the proposal. *Id.* at 18.

¶3 In her Statement of Disability accompanying her disability retirement application, the appellant described her conditions as follows: history of bilateral carpal tunnel syndrome; tenderness and spasm in lower back, neck, and right shoulder; constant lumbar pain and muscle spasm with recurrent lower back

strain; right shoulder rotator cuff sprain and strain; recurring tenderness and swelling knees; and anxiety and depression. IAF, Tab 3, subtab IID. She stated that she became disabled in June 2003. *Id.*, subtab IID. OPM denied her application and affirmed its denial in a reconsideration decision. *Id.*, subtabs IIA, IIC.

¶4 The AJ affirmed OPM's reconsideration decision denying the appellant's disability retirement application. Because the appellant did not request a hearing, the AJ decided the case on the written record. The AJ concluded that the medical evidence did not establish that the appellant was unable to perform useful and efficient service in her position. Specifically, the AJ found that reports from Dr. David Changaris, a board-certified specialist in Neurological Surgery and Pain Medicine, did not identify any specific duties that the appellant could not perform. The AJ also found that the appellant's 2005 carpal tunnel release surgery occurred after she resigned, and no medical records indicated that her carpal tunnel condition was a problem before she resigned. The AJ found that no objective evidence supported the appellant's claim of continuing pain from the May 2003 accident. The AJ acknowledged that the Department of Veterans Affairs (DVA) rated the appellant disabled, retroactive to June 24, 2003, based on her previous military service.[1] The AJ found, though, that the DVA simply made a general finding that the appellant was unemployable without identifying specific tasks that she was unable to perform. The AJ further found that the DVA based its rating, in part, on the appellant's worsening condition after her September 2004 resignation. ID at 12-13.

¶5 The appellant filed a PFR. PFR File, Tab 1. OPM did not respond to the PFR.

---

[1] The appellant retired from the military after 20 years of service with the Department of the Navy. Remand Appeal File, Tab 1, subtabs A, C.

ANALYSIS

¶6 To be eligible for a FERS disability-retirement annuity, the appellant must establish the following: (1) She has completed at least 18 months of creditable civilian service; (2) while employed in a position subject to FERS, she became disabled because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or if there is no such actual service deficiency, the disabling medical condition is incompatible with either useful and efficient service or retention in her position; (3) the disabling medical condition is expected to continue for at least 1 year from the date the disability retirement application is filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) she must not have declined a reasonable offer of reassignment to a vacant position. *See* 5 U.S.C. § 8451(a); 5 C.F.R. § 844.103(a); *Dussault v. Office of Personnel Management*, 103 M.S.P.R. 92, ¶ 6 (2006). The appellant bears the burden of proof by preponderant evidence. 5 C.F.R. § 1201.56(a)(2).

¶7 The record shows that the appellant has satisfied the first, third, and fifth eligibility criteria. The agency first employed the appellant on July 14, 2002. IAF, Tab 3, subtab IIE. As previously noted, she resigned on September 20, 2004. *Id.*, Tab 1 at 18. Thus, she has at least 18 months of credible civilian service. Moreover, her condition has continued for at least 1 year since she filed her March 4, 2004 disability retirement application. In addition, she did not decline an offer of reassignment to a vacant position. IAF, Tab 3, subtab IID (Agency Certification of Accommodation and Reassignment Efforts). Therefore, she is entitled to disability retirement benefits if she satisfies the second and fourth criteria. As discussed below, I would find that she has done so.

¶8 The AJ found that the appellant did not satisfy the second eligibility criterion. She found that the appellant did not present sufficient objective medical evidence to support her claim of continuing pain since the May 2003 accident or to show that her carpal tunnel condition was a problem before her

resignation. She also found that Dr. Changaris did not identify any specific duties that the appellant could not perform. ID at 12-13.

¶9 A determination regarding entitlement to disability retirement benefits must consider objective clinical findings, diagnoses and medical opinions, subjective evidence of pain and disability, and evidence relating to the effect of the applicant's condition on her ability to perform in the grade or class of position last occupied. *See Dunn v. Office of Personnel Management*, 60 M.S.P.R. 426, 432 (1994), *dismissed*, 91 F.3d 169 (Fed Cir. 1996) (Table). Thus, objective medical evidence is only one of several factors to be considered. The appellant's failure to submit such evidence cannot be the sole reason for denying her disability retirement. *See, e.g., Rainone v. Office of Personnel Management*, 102 M.S.P.R. 88, ¶ 13 (2006). Further, objective medical evidence includes the results of observations during physical examination, as well as the results of laboratory and clinical tests. *E.g., Gornto v. Office of Personnel Management*, 102 M.S.P.R. 153, ¶ 6 (2006). Moreover, an appellant's subjective evidence of disability and pain is entitled to consideration and weight when it is supported by competent medical evidence. *E.g., Newkirk v. Office of Personnel Management*, 101 M.S.P.R. 667, ¶ 16 (2006).

¶10 In addition, under *Mullins-Howard v. Office of Personnel Management*, 71 M.S.P.R. 619, 627 (1996), there is an exception to the rule that the medical evidence itself must show that the medical condition affects the appellant's ability to perform specific job duties and requirements. Where the Board is presented with the position description and with medical evidence that unambiguously and without contradiction indicates that the appellant cannot perform the duties or meet the requirements of the position, the Board may link the medical evidence to the job duties and requirements and find that the appellant is entitled to disability retirement. In such circumstances, the Board may make this finding absent reference in the medical evidence to specific job duties or requirements. Considering medical evidence in this way is part of the

Board's role as the ultimate decision maker with the authority to independently evaluate the probative value of medical evidence absent contradictory medical evidence from another source. *E.g., Dussault,* 103 M.S.P.R. 92, ¶ 9.

¶11 Applying these standards, I would find that the appellant has presented sufficient evidence to satisfy her burden of proving the second eligibility criterion. According to the medical evidence, and as the AJ recognized, Dr. Changaris first saw the appellant on June 26, 2003, i.e., within a week after she stopped going to work. His physical examination of the appellant showed mild to moderate tenderness and spasm in the neck and shoulders. He diagnosed her with lumbar, knee, and shoulder pain; limited range of motion of the lumbar spine; muscular spasms; radiating pain into the knees and right shoulder; and anxiety. Dr. Changaris initiated medical pain management and manual therapy and stated that the appellant was to be off work. Further, although right wrist x-rays and a whole-body bone scan performed on August 11, 2003, were generally normal, the scan showed mild bilateral shoulder degeneration. Because of her anxiety and depression, the appellant was referred to Sally DiGiovanni, LFMT, for psychotherapy. The appellant was placed on Zoloft, which was later changed to Wellbutrin. IAF, Tab 3, subtab IID.

¶12 Dr. Changaris stated that the appellant reached maximum medical improvement on February 5, 2004. Although his prognosis for the appellant at that time was fair to good, he still diagnosed her with low back pain, knee pain, and bilateral rhomboid strain. He continued to see the appellant monthly for medication evaluation and refills. He said that the appellant remained off work according to his orders. He listed the appellant's restrictions as no lifting greater than 10 pounds; no repetitive bending, twisting, stooping, squatting, crawling or climbing; no overhead work or repetitive use of either arm or shoulder; and stretching or changing positions as needed. He concluded that the appellant had developed chronic pain syndrome. IAF, Tab 3, subtab IID. In a subsequent January 2005 letter, Dr. Changaris stated that, due to chronic low back and right

shoulder pain as well as moderate depression, the appellant was unable to perform satisfactorily in a work environment. He stated that the appellant would require numerous days off because of her pain; that her restrictions required her to sit or stand as she needed; and that she should not lift more than 10 pounds, perform overhead work, repeatedly move her lower back or shoulders, or use vibratory equipment. IAF, Tab 3, subtab IIB. In an October 5, 2005 letter, Dr. Changaris stated that current diagnoses included low back pain, degenerative changes in the knees, depression, anxiety, chronic right rotator cuff strain, degenerative changes in the shoulders, cervicobrachial syndrome, and chronic pain syndrome. He stated that her prognosis was guarded to poor. He further stated that she had reached maximum medical improvement and that further care and treatment were unlikely to return her to work. Refiled Appeal File (RAF), Tab 1, subtab E.

¶13 In addition, the appellant submitted evidence from Dr. Tsu-Min Tsai, M.D. of the Kleinart Kutz Hand Care Center, where the appellant received a follow-up evaluation on September 15, 2005. Dr. Tsai stated that the appellant had carpal tunnel release surgery "with scope assist" in 2001 and 2002 and had an open carpal tunnel release and a trigger thumb release in May 2005. RAF, Tab 1, subtab E. Dr. Tsai further stated that the appellant's 20 years of lifting, carrying, and gripping related to her work in food services "could have aggravated the dormant condition [carpal tunnel] and brought it to disabling reality." *Id.* Dr. Tsai stated that the appellant's trigger thumb is aggravated by the same conditions. *Id.* Dr. Tsai filled in a form on August 2, 2005, checking that the appellant was able to return to "alternative duty," i.e., light work with identified restrictions. RAF, Tab 1, subtab E. He did not indicate that the appellant could perform in her Food Service Worker position, however. *Id.*

¶14 I would find that the weight of this medical evidence supports the appellant's disability retirement application.[2] Moreover, I would find that this case falls within the *Mullins-Howard* exception.

¶15 The appellant's position description identified her major duties as follows:

> Brings food and supplies to and assembles on the tray line;
> Works a position on the tray line, assembling patient trays;
> Loads trays into the transportation trucks;
> Delivers nourishments and trays to patient's bedside and/or dining room table;
> Makes, pours and serves coffee and/or hot water;
> Stores food and supply items;
> Cleans work areas and equipment;
> Picks up and washes soiled trays, service ware and pots and pans[.]

IAF, Tab 3, subtab IID. Admittedly, the position description did not list specific physical requirements. For example, it did not state how much weight the incumbent was required to lift and carry; how many hours the incumbent was required to walk and stand; or how often the incumbent was required to bend, twist, and reach. The position description indicates, however, that such activities were required.

---

[2] I would find, however, that the appellant has not met the second eligibility criterion for establishing her entitlement to disability retirement based on depression. As the AJ found, the appellant submitted evidence that she has been diagnosed with depression. *See, e.g.*, RAF, Tab 1, subtab E (LCSW Joan Epstein's August 3, 2005 letter); PsyD Peggy Henderson's August 26, 2004 Psychological Test Report); ID at 9-12. The existence of a disability in itself, however, does not establish entitlement to disability retirement. An employee must show not only that she has a medical condition, but that the condition prevents her from performing useful and efficient service in her position. 5 U.S.C. § 8451(a); 5 C.F.R. § 844.103(a). In that regard, the evidence also indicated that the appellant's depression had not affected her job performance. IAF, Tab 3, subtab IID, Progress Notes Pages 79, 98-99. Moreover, although Epstein stated that the appellant was easily stressed in work environments, RAF, Tab 1, subtab E, the Board has found that stress, anxiety, and discomfort is not enough by itself to establish disability; rather, the evidence must also demonstrate that these factors are so severe as to prevent an employee from performing the specific duties of the position in question, *e.g., Dussault*, 103 M.S.P.R. 92, ¶ 15. Here, the evidence does not do so. Therefore, I would conclude that the appellant has not established her entitlement to disability retirement based on depression or anxiety. *Id.*

¶16 In that regard, the appellant specifically explained the duties of her position that she could not perform because of her physical conditions. The appellant stated that her medical conditions interfered with her ability to carry food trays, clean work space equipment, clean overhead, and clean under counters. She further stated that she was unable to perform any task requiring repetitive use of her hands, arm, and shoulder, and that she was restricted to lifting no more than 10 pounds. IAF, Tab 3, subtab IID (Statement of Disability). The appellant stated that she had pain when writing, walking, bending, standing up, twisting, reaching, grabbing, and embracing. *Id.*, subtab IIB. In a sworn statement, she averred that she can no longer provide efficient performance in a food service capacity because her multiple physical disabilities are further exacerbated when performing food service work, which requires repetitive movements, standing for long periods of time, bending, and reaching. RAF, Tab 7.

¶17 Because the appellant's subjective statements of disability are consistent with her health-care providers' observations, they are entitled to weight. *See, e.g.*, *Gornto*, 102 M.S.P.R. 153, ¶ 10. Further, although absences from work do not conclusively establish that an employee is incapable of rendering useful and efficient service, they are nonetheless a factor worthy of consideration in judging disability. *Id.*, ¶ 11. OPM offered no evidence or argument to rebut the appellant's specific description regarding the physical requirements of her position. Thus, as noted above, I would find that the *Mullins-Howard* exception applies. *See, e.g.*, *Dussault*, 103 M.S.P.R. 92, ¶¶ 10-14; *see also Rainone*, 102 M.S.P.R. 88, ¶¶ 8-9.

¶18 The June 20, 2005 decision of the Social Security Administration (SSA) to deny the appellant's disability benefits claim does not warrant a different result. The SSA based its decision on its finding that the medical evidence she submitted did not establish that she was unable to perform any substantial gainful work. RAF, Tab 1, subtab D. Indeed, the decision stated, "We realize that your

condition prevents you from doing any of your past work." *Id.* Here, however, the determination is based on the appellant's ability to perform the duties of her position as a Food Service Worker. Moreover, as previously noted, the DVA rated the appellant disabled, granting her claim for individual unemployability. RAF, Tab 1, Subtab C. I therefore would find that the SSA denial of benefits is outweighed by the other evidence in this case. *See Sachs v. Office of Personnel Management*, 99 M.S.P.R. 521, ¶ 11 (2005) (in determining entitlement to FERS disability retirement, OPM and the Board must consider both SSA and DVA awards and terminations of benefits, but may find that such evidence is outweighed by other evidence).

¶19 I would find that the appellant also has met the fourth eligibility criterion for establishing her entitlement to disability retirement, that is, she cannot be accommodated in her current position and is not qualified for reassignment to a vacant position at the same grade or level in which she could render useful and efficient service. *See* 5 C.F.R. § 844.103(a)(4)-(5); *Dussault*, 103 M.S.P.R. 92, ¶ 16. The Agency Certification of Reassignment and Accommodation Efforts stated that reasonable accommodation had not been made because the appellant had not presented sufficient medical documentation to establish she had a disabling medical condition. IAF, Tab 3, subtab IID. It further stated that reassignment was not possible because there were no vacant positions at the agency at the same grade or pay level and tenure within the same commuting area for which the appellant was qualified and met the physical standards. *Id.* I would find, however, that the physical requirements for performing as a Food Service Worker confirm the impracticability of providing a reasonable accommodation for the appellant's physical disabilities.

¶20 Accordingly, I dissent from the majority's opinion. I would find that the appellant has shown by preponderant evidence that she is entitled to a disability retirement annuity. *See Dussault*, 103 M.S.P.R. 92, ¶¶ 16-17.

/s/
Barbara J. Sapin
Member